

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re:)	MDL Docket No. 1376
)	
ZONOLITE ATTIC INSULATION)	The Honorable Patti B. Saris, Presiding
PRODUCTS LIABILITY LITIGATION)	
)	
THIS DOCUMENT RELATES TO: ALL)	
ACTIONS)	
)	

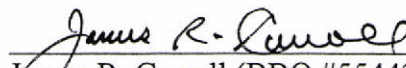
**DEFENDANT SEALED AIR CORPORATION'S
JOINDER IN THE GRACE DEFENDANTS' BRIEF IN OPPOSITION
TO PLAINTIFFS' MOTION FOR CLASS CERTIFICATION AND NOTICE**

Defendant Sealed Air Corporation concurs with the reasons set forth in the Grace
Defendants' Brief In Opposition To Plaintiffs' Motion For Class Certification And Notice.

Dated: February 22, 2001
Boston, Massachusetts

Respectfully submitted,

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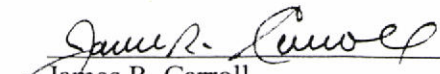

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I, James R. Carroll, hereby certify that on February 22, 2001, I caused a true copy of the foregoing Defendant Sealed Air Corporation's Joinder In The Grace Defendants' Brief In Opposition To Plaintiffs' Motion For Class Certification And Notice to be served by facsimile and first-class mail, postage prepaid, upon counsel of record for each other party as indicated on the service list attached hereto.

Dated: February 22, 2001


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UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

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U.S. DISTRICT COURT
DISTRICT OF MASS.

In re:

ZONOLITE ATTIC INSULATION
PRODUCTS LIABILITY LITIGATION

MDL Docket No. 1376

PAUL PRICE, JOHN PREBIL and
MARGERY PREBIL, on behalf of
themselves and all others similarly situated,

Plaintiffs,

Civil Action No. CV 0071-M-DWM

(Transferred from the District of Montana,
Missoula Division)

v.

W. R. GRACE & COMPANY (a Delaware
corporation); W.R. GRACE & COMPANY-
CONN. (a Connecticut Corporation); W.R.
GRACE & CO., a/k/a GRACE, an association
of business entities; SEALED AIR
CORPORATION (a Delaware corporation),

Defendants.

**PLAINTIFFS' REPLY MEMORANDUM OF POINTS
AND AUTHORITIES IN SUPPORT OF
MOTION FOR CLASS CERTIFICATION AND NOTICE**

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1 **I. INTRODUCTION**

2 Is it only ironic? On the same day that W. R. Grace opposes class certification in this
3 case largely on the claim that its vermiculite products are safe, United States government agencies
4 release preliminary findings of a comprehensive medical testing program designed to identify the
5 health effects likely to be asbestos related due to residential or occupational exposure to Grace's
6 vermiculite in Libby, Montana. The result: exposure to the same asbestos-contaminated vermiculite
7 which comprises Zonolite Attic Insulation is likely to pose a substantial threat to public health.

8 The medical screening results, first reported on February 22, 2001 by the United
9 States Agency for Toxic Substances and Disease Registry (ATSDR), indicate that, of the one
10 thousand and seventy eight Libby community members whose screening test results are presently
11 available, 30% already show clinical lung abnormalities. *Preliminary Findings of Medical Testing*
12 *of Individuals Potentially Exposed to Asbestoform Minerals Associated with Vermiculite in Libby,*
13 *Montan: An Interim Report for Community Health Planning* by the Department of Health and
14 Human Services, Agency for Toxic Substances and Disease Registry ("ATSDR"), February 22,
15 2001, Exhibit 1 to Sobol Reply Declaration (hereinafter "Exhibit"). Notably, many of those in
16 whom lung abnormalities were found lived in homes insulated with Zonolite insulation. *Id.*
17 Specifically, 34 of the 1,078 tested residents reported that their potential exposure consisted of
18 vermiculite insulation in their homes, and the chest x-rays of 14% of these insulation-only exposure
19 participants showed scarring. *Id.*

20 The ATSDR findings strongly reinforce the need for class treatment of Plaintiffs'
21 claims by highlighting the central issues common to the claims of all class members, namely the
22 potential hazards of asbestos-contaminated Zonolite Attic Insulation and Grace's corollary
23 responsibility to implement the asbestos notification, education and remediation program which
24 plaintiffs seek in order to preserve class members' health and safety, and avoid needless injuries and
25 deaths.

26 Even Grace's brief in opposition to class certification strongly supports the propriety
27 of class treatment, since its mantra that "Zonolite is Safe" spotlights the central issue common to
28 every material aspect of every class member's claim. Grace Brief at 2-10. In contrast, Plaintiffs

1 contend that Zonolite poses serious potential exposure and contamination hazards when disturbed,
 2 and that the ATSDR results corroborate plaintiffs' contentions. The ensuing single "Safe vs.
 3 Hazardous controversy is ideally suited for unitary class treatment, the only vehicle which would
 4 permit this court to fairly and efficiently resolve the dispute on behalf of the class and Grace.

5 Grace ignores all of the considerable flexibilities and efficiencies available among the
 6 various available class certification provisions, 23(b)(2), 23(b)(1)(A) and (B), 23(b)(3) and
 7 23(c)(4)(A) and refuses to acknowledge the propriety of class treatment of any claim or issue under
 8 any circumstance. Grace's obstinance reveals only its desire to escape potential liability for its own
 9 shocking misconduct in intentionally concealing the asbestos hazards from the class.

10 Once this Court adjudicates the central issue of Zonolite's safety, then it will be able
 11 to issue a class-wide ruling which will resolve the matter once and for all, either by holding Grace
 12 responsible for the equitable asbestos notification, education and remediation program sought by
 13 plaintiffs or, alternatively, by ruling for Grace against the class. Either disposition fully justifies
 14 class treatment of plaintiffs' equitable claims.

15
 16 A. **The ATSDR Findings Strongly Support Class Treatment of Plaintiffs' Request
 For Equitable Asbestos Notification, Education And Remediation.**

17 The ATSDR, an agency of the United States Department of Health and Human
 18 Services (DHHS), recently completed a community-based medical testing program in Libby,
 19 Montana developed in response to reports of illness among persons exposed to asbestos-
 20 contaminated vermiculite in Libby, Montana. *See* Exhibit 1. The medical testing program was
 21 conducted by the ATSDR in cooperation with the DHHS Region VIII Office, the EPA, the Montana
 22 Department of Health and Human Services and the Lincoln County Environmental Health
 23 Department. *Id.* at 1. The testing program involved over 6,000 participants, and was implemented
 24 between July and November 2000. *Id.*

25 The ATSDR's "principal goal" was to identify the asbestos-related health effects of
 26 participants exposed to asbestos from the Libby, Montana vermiculite mine and to refer them for
 27 appropriate medical treatment. Exhibit 1 at 1. From July through November 2000, medical testing
 28 was made available and provided to Grace workers; household contacts of the former workers; and

1 individuals who resided, worked, attended school, or participated in activities in the Libby area for
 2 six months or more prior to December 31, 1990. *Id.* The actual medical testing consisted of a
 3 verbally administered questionnaire, chest radiographs (x-rays) and simple spirometry testing to
 4 measure lung function. *Id.*

5 The questionnaire was administered to obtain health information as well as
 6 demographic characteristics, residential history (including residence in homes with Zonolite Attic
 7 Insulation), occupational history, behavior patterns and related issues. *Id.* The chest radiography
 8 included two oblique views, to improve the test's sensitivity to detection of pleural abnormalities, as
 9 well as a posterior-anterior view and the radiography equipment and procedures complied with
 10 guidelines developed by NIOSH. *Id.* Radiographs were evaluated by the on-site radiologist and
 11 three physicians nationally recognized as experts in asbestos-related conditions, as well as certified
 12 "B-readers."^{1/} *Id.* at 8. Spirometry testing followed the guidelines of the American Thoracic Society
 13 and was performed by a qualified technician and the test results were monitored to ensure the quality
 14 of the results and validity of interpretations. *Id.* at 9.

15 The medical testing program was designed to identify participants with asbestos-
 16 caused abnormalities and to refer them for diagnosis and treatment. According to the ATSDR, the
 17 collected data, while not a formal epidemiologic study, nevertheless:

18 provides important information about the prevalence and degree of
 19 asbestos-related abnormalities among Libby residents, and about the
 20 possible relationships between these abnormalities and each of the
 21 several exposure pathways evaluated.

21 *Id.* at 9.

22 The February 2001 report addresses the results of the 1,078 participants whose
 23 medical screening results were already available, representing 18% of the total number of
 24 participants, and a subsequent report(s) will be issued as the balance of results are obtained for the
 25 remaining participants. *Id.* Of the 1,078 participants:

- 26 - 127 are former Grace workers
- 27 - 34 had vermiculite insulation in their homes

28 ^{1/}B-readers are physicians certified by NIOSH as qualified to interpret radiographs for
 environmental dust-related diseases. ATSDR Report at 8.

- 558 had recreational contact with vermiculite
- 177 had household contact with vermiculite
- 116 had work-related contact with vermiculite and
- 53 had no known exposure to vermiculite.

Id. at Report Summary, p.1. Of the 1,078 participants:

- 95% reported some contact with vermiculite
- 30% of adults tested had scarring of the chest wall seen by at least one physician on the chest x-ray and
- 19% of adults tested had scarring seen by at least two of the certified x-ray specialists

Id. at Report Summary, p. 2. The number of people in each group who showed scarring was large:

- 14% of those who have vermiculite insulation in their homes;
- 37% of Grace workers;
- 20% of household contacts;
- 18% of those reporting occupational vermiculite exposure;
- 14% of other participants;
- 13% of those with recreational vermiculite contact.

Id. at Report Summary, p. 2.

In sum, the ATSDR's shocking lung injury statistics reveal a public health crisis caused by asbestos-contaminated vermiculite and highlight plaintiffs' contention that the presence of Vermiculite in Zonolite Attic Insulation constitutes contamination with unusually dangerous form of asbestos, moreover this asbestos poses serious potential exposure and contamination hazards which merit plaintiffs' requests for equitable notification, education and remediation relief which, as a matter of fairness and practicality, can only be addressed on a class basis.

B. Zonolite Is Unsafe.

Grace's contention that "Zonolite is Safe" is analogous to its recent contention in the Montana EPA. litigation, when it opposed EPA access to the Libby mine on the grounds that Libby asbestos contamination was not a demonstrated problem. This absurd contention was soundly rejected by United States Chief Judge Donald W. Molloy of the District of Montana, who stated that the conclusion that there is a reasonable basis to believe that asbestos contamination is a problem in Libby, "is as plain to see as the East Front of the Rockies." Exhibit 4, *United States of America v. W.R. Grace & Company, et al.*, CV-00-167-M-DWM, Order granting United States' motion for immediate EPA access, (D. Mont. March 9, 2001). The same can be said here.

1 Indeed, Grace acknowledges that disturbance of Zonolite Attic Insulation can result in
 2 exposure to airborne fibers. However, Grace claims that asbestos must be inhaled in large quantities
 3 and over lengthy periods of time before it can cause any risk of harm. Of course, as Judge O'Connor
 4 found in her ruling on plaintiffs' motion for preliminary injunctive relief, Grace's argument creates
 5 an issue of fact for trial of the class claims. Moreover, the United States Government and leading
 6 medical-scientific organizations have taken the position that for asbestos-related cancers, such as
 7 mesothelioma, there is no known safe level of exposure to asbestos.

8 For example, in 1976, the National Institute for Occupational Safety and Health
 9 (NIOSH), an independent, unbiased governmental entity under the Public Health Service stated:

10 There are data that show that the lower the exposure, the lower the risk
 11 of developing cancer. Excessive cancer risks have been demonstrated
 12 at all fiber concentration studies to date. Evaluation of all available
 human data provides no evidence for a threshold or for a "safe" level
 of asbestos exposure.

13 Exhibit 5, Revised Recommended Asbestos Standard.

14 Similarly, the EPA has also taken the position that there is no safe level of exposure.
 15 In the March 1979 EPA guidance document entitled "Asbestos-Containing Materials In School
 16 Buildings: A Guidance Document," EPA stated:

17 **Is there a safe level of exposure?**

18 EPA and the scientific community believe that any exposure to
 19 asbestos involves some health risk. No safe level of exposure (or
 20 threshold exposure level) has been established. Further, it is
 impossible at this time to confidently estimate the exact degree of risk
 associated with low-level exposures.

21 **What is considered the best or safest approach to asbestos
 22 exposure?**

23 Where possible, all exposure to asbestos should be eliminated or
 controlled.

24 Exhibit 6, at 1.

25 Further, the United States Government has found through objective studies that
 26 significant disease can occur as the result of short low level exposures to asbestos. For example, in
 27 its 1980 publication entitled, "Workplace Exposure to Asbestos," NIOSH stated:

[T]he absence of a threshold is further indicated by the dramatic evidence of asbestos-related disease in members of asbestos-worker households and in persons living near asbestos-contaminated areas. These households and community contacts involved low-level and/or intermittent casual exposure to asbestos. Studies of duration of exposure suggest that even at very short exposure periods (1 day to 3 months) significant disease can occur.

Exhibit 7, at 3.

This 1980 observation has now been dramatically corroborated by the 2001 Preliminary Findings health consequences of the Libby exposure. Grace also ignores the fact that children and smokers living in homes with Zonolite Attic Insulation are at greater risk of disease. In EPA's March 1983 guidance document entitled, "Guidance For Controlling Friable Asbestos-Containing Materials in Buildings," EPA stated:

Special Concerns:

Children and young adults who are exposed to asbestos have a greater chance than older people of developing certain asbestos-related diseases due to a longer remaining life span during which disease may develop. Also, smokers exposed to asbestos are at greater risk than nonsmokers with a similar level of exposure.

Exhibit 8, at 1-1.

While acknowledging that peak exposures to asbestos can occur in connection with the disturbance of Zonolite Attic Insulation, Grace fails to disclose to the court the very serious dangers posed by these peak exposures, and the fact that these dangers have been acknowledged by the United States Government and by medical-scientific entities. For example, in the EPA's proposed rules for friable asbestos-containing materials in schools, known as the AHERA Regulation, EPA stated:

The presence of unidentified friable asbestos-containing materials in school buildings increases significantly the likelihood that peak exposures to asbestos will occur. Since peak exposures in schools entail risks of serious injuries which may be reduced at extremely low costs, EPA finds that these exposures present an unreasonable risk and should be reduced accordingly.

Peaks will occur during disturbances of friable material (either accidental or during repair or renovation operations) and during resuspension of previously released fibers by cleaning and maintenance operations (sweeping, dusting, vacuuming, etc.), or by general activities in the vicinity of fibers that have settled on floors and other surfaces.

1 Exhibit 9, at 61972-3.

2 Notably, while marketing and selling Zonolite Attic Insulation, W. R. Grace's top
3 leadership acknowledged the position being taken by experts in the field that there is no safe level of
4 asbestos exposure and that any exposure is potentially hazardous. In an internal May 24, 1977 W. R.
5 Grace memorandum, regarding "Tremolite in Vermiculite," marked "personal and confidential," a
6 top Grace official noted:

7 General public liability, stemming from the sale of consumer products,
8 is a low-level risk with a very high potential liability if it develops.
9 While we have no evidence of any adverse affect of our products on
10 consumers, neither can we offer convincing evidence that they are
11 absolutely safe. Making such a case is handicapped by the number of
12 "experts" who claim that there is no safe level with the inference that
any exposure is potentially hazardous. This leaves us open to liability
without a good defense over a broad range of alleged hazards. A
decision to label our consumer products would eliminate the risk of
future liability, while exacerbating the risk of claims (mostly not
bonafide) from past use of the product.

13 Exhibit 10, at 17-18.

14 As it turned out, Grace's own foretelling of liability based on the fact that there is "no
15 safe level" of exposure and that "any exposure is potentially hazardous" turned out for Grace to be
16 true. In fact, Grace has to date settled 25 to 100 asbestos-related bodily injury claims involving
17 exposure to asbestos-contaminated attic insulation. Exhibit 11, August 10, 2000 letter from Grace's
18 counsel, James Restivo, to Robert M. Turkewitz. This class action is intended to prevent further
19 needless asbestos contamination and bodily injury as a result of exposure to asbestos from Zonolite
20 by providing appropriate warnings that will allow occupants to minimize any future exposure and
21 arm them with the knowledge to protect themselves.

22 **C. The Relief Sought By Plaintiffs Is Purely Equitable and Certification Is**
23 **Appropriate under Rule 23(b)(2).**

24 Among a court's highest callings is its exercise of inherent and constitutionally
25 recognized equitable powers to issue preliminary and final injunctive relief, so as to preserve public
26 health and safety. If judicial experience with asbestos litigation has taught anything, it is that
27 avoidance of human exposure to asbestos and avoidance of property contamination is preferable to
28 protracted litigation which invariably follows in the aftermath of exposure and contamination. As
the Preliminary Findings demonstrate, vermiculite exposure leads to irreparable harm. There is no

1 cure for asbestos. The facts of this case cry for immediate equitable relief, as opposed to
 2 after-the-fact efforts to obtain a money judgment to compensate for the loss of a loved one or the
 3 considerable financial damages that typically follow in the wake of unknowing contamination of
 4 property with asbestos.

5 In this regard, Plaintiffs genuinely seek equitable relief alone: equitable asbestos
 6 notification, education, and remediation. The notification component would serve to effectively
 7 advise class members of dangers associated with Zonolite Attic Insulation, thus averting future
 8 injury. The education component would serve to educate consumers as to actions they must take as
 9 homeowners to avoid asbestos exposure and contamination of property and the remediation
 10 component would ensure that appropriate operation, maintenance, and abatement activities, in fact,
 11 take place, through creation of an equitable fund that facilitates such activities. Moreover, only a
 12 court supervised equitable program will ensure that funds are reserved for asbestos remediation
 13 activities.

14 Equity as implemented under the class action rules has evolved to embody three
 15 distinct, and distinctly American principles: (1) efficiency and economy in judicial administration;
 16 (2) universal access to civil justice; and (3) empowerment of small claimants to achieve redress from
 17 corporate entities. Modern Rule 23 is the claim aggregation vehicle best situated to respond to the
 18 pressing, equitable asbestos notification/education/remediation needs of the class and the proposed
 19 equitable remedy presents a compelling basis for equity action, the avoidance of contamination,
 20 serious injuries and death.

21 Plaintiffs genuinely insist upon such an equitable program, because such equitable
 22 relief is far superior to the mere award or distribution of money damages and since only a court
 23 ordered equitable fund ensures that notification, remediation, education and asbestos abatement
 24 actually occur. This is a central distinction between equitable and at-law remedies, as recognized by
 25 the California Supreme Court in its leading medical monitoring decision, *Potter v. Firestone Tire &*
 26 *Rubber Co.*, 6 Cal. 4th 965, 863 P.2d 795, 825 (Cal. 1993):

27 Although conventional damage awards do not restrict plaintiffs in the
 28 use of money paid as compensatory damages, mass-exposure toxic tort
 cases involve public interest not present in conventional tort litigation.

The public health interest is served by a fund mechanism that encourages regular medical monitoring for victims of toxic exposure.

(Quoting *Ayers v. Jackson Tp.*, 525 A. 2d 287, 314 (NJ 1987).)

In contrast to a lump sum payment following money judgment, an equitable, court-supervised fund will pay or reimburse class members, for the cost of testing and remediating their houses and eliminates the option of spending the money for other purposes. The remedial fund will also assure that asbestos remediation funds will be paid out only for remediation actually administered, thus serving to limit the liability of defendants to expenses actually incurred. Decisions of courts around the country, previously cited in Plaintiffs' motion in support of class certification, recognize that the fact a defendant finances the equitable fund does not change the equitable nature of the relief. The relief sought by Plaintiffs, therefore, is ideally suited for class treatment under Fed. R. Civ. P. 23(b)(2).

In the *School Asbestos* cases, previously cited in Plaintiffs' motion for class certification, Rule 23(b)(3) damages claims were certified, instead of 23(b)(2) equitable claims, since the class member school districts, unlike the class members in this action, were already advised by the federal government of the asbestos hazards, and were already required by federal law to remediate the asbestos contamination, distinguishing the appropriate relief from that sought here. *In re School Asbestos Litig.*, 789 F.2d 996 (3d Cir. 1986); *Central Wesleyan College v. W. R. Grace & Co.*, 6 F.3d 177 (4th Cir. 1993).

Class actions frequently seek and/or provide for warnings similar to those sought here. See *Garza v. Sporting Goods Properties, Inc.*, No. SA-93-CA-1082, 1996 U.S. Dist. LEXIS 2009 (W.D. Tex. Feb. 6, 1996) (approving class settlement including equitable relief in the form of warnings and facilitation of replacement of defective rifle barrels). Similarly, in the Federal diet drug litigation, plaintiffs successfully sought and obtained first litigation class certification and, subsequently, settlement class certification of medical monitoring claims designed to protect and preserve health and safety by warning class members of risks of the diet drugs and supplying the medical testing required to uncover damage. *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*; *Jeffers v. American Home Products Corp.*, MDL 1203, 1999 U.S. Dist. LEXIS 13228 (E.D. Pa. Aug. 26, 1999) (certifying multi-state medical monitoring

litigation class); *In re Diet Drugs (Phentermine, Fenfluramine, Dexfenfluramine) Prods. Liab. Litig.*; *Brown v. American Home Products Corp.*, MDL 1203, 2000 U.S. Dist. LEXIS 12275 (E.D. Pa. 2000) (approving class action settlement for persons nationwide exposed to fenfluramine drugs).

Because the relief sought by Plaintiffs is equitable in character, Plaintiffs' motion fulfills the requirements of Rule 23(b)(2).

D. Plaintiffs' Class Definition is Appropriately and Narrowly Defined, and the Proposed Class is Reasonably Ascertainable.

The proposed class is objectively and narrowly defined and reasonably ascertainable. Indeed, the class is reasonably limited to owners and occupiers of property with Zonolite Attic insulation, and examination of the merits of any potential class members' claim is unnecessary in order to determine whether that person is a member of the class. Indeed, the current draft of class notice proposed by the *Barbanti* plaintiffs well establishes the facility with which Zonolite Attic Insulation is described and identified for purposes of establishing class membership. Exhibit 3.

There is an identifiable class because class members can be ascertained by reference to objective criteria (the presence of Zonolite attic insulation in their homes), and class membership is not contingent on a prospective class member's state of mind, *See Elliott v. ITT Corp.*, 150 F.R.D. 569, 513 (N.D. Ill. 1992). It would be difficult to imagine a class that is more objectively defined, and it would not be possible to more narrowly circumscribe the class definition.

The proposed class here is more objectively and narrowly defined than others that have been certified by various courts. *E.g., Pottinger v. Miami*, 720 F. Supp. 955, 957 (S.D. Fla. 1989), *remanded on other grounds*, 40 F.3d 1155 (11th Cir. 1994), *opinion after remand*, 76 F.3d 1154 (11th Cir. 1996) (class defined as: homeless individuals who had been or expected to be arrested for conduct essential to their daily lives); *Adames v. Mitsubishi Bank Ltd.*, 133 F.R.D. 82, 89 (E.D.N.Y. 1989) (all non-oriental and non-Japanese employees who had reasonable understanding or expectations of receiving promotion, transfer or job upgrade); *Buycks-Roberson v. Citibank Fed. Sav. Bank*, 162 F.R.D. 322, 328 (N.D. Ill. 1995) (applicants for mortgage loans whose applications were denied, based on the fact that they were African-American or lived in predominantly African-American neighborhoods).

1 Since this action seeks predominantly injunctive and declaratory relief, there is no
 2 need to examine the particular circumstances of a potential class member's situation in order to
 3 determine class membership. All class members would be entitled to the same program of injunctive
 4 relief sought by the named plaintiffs, though levels of remediation would ultimately vary according
 5 to circumstance. Even if certain steps need to be taken and certain evidence examined in order to
 6 determine class membership, this would not preclude class certification. *See, e.g., In re New*
 7 *England Mut. Life Ins. Co. Sales Practices Litig.*, 183 F.R.D. 33, 43 (D. Mass. 1998); *Elliott v. ITT*
 8 *Corp.*, 150 F.R.D. at 575.

9 Grace cites Judge Keeton's decision in *Kent v. Sunamerica Life Ins. Co.*, 190 F.R.D.
 10 271 (D. Mass. 2000), in support of its arguments on the class definition. However, Grace ignores
 11 Judge Keeton's well-reasoned decision in *New England Mutual*, in which he summarily rejects the
 12 same argument made by defendants here:

13 No need to deny class certification exists, however, simply because
 14 any particular plaintiff may have to offer additional proof at some
 15 point in this MDL case, to assert class membership. All class actions
 16 necessarily require the court to resort to some means of determining
 17 who is entitled to membership in the class. No basis exists in the
 record now before the court for concluding that, as defense asserts,
 those determinations of membership for individual claimants will be
 so onerous as to necessitate numerous "mini-trials," one for each
 potential class member.

18 *Id.*, 183 F.R.D. at 43.

19 The EPA has estimated that more than 70% of the vermiculite mined in the world
 20 originated from the Libby mine. Exhibit 3, "EPA New England Questions and Answers Regarding
 21 Vermiculite Insulation." Defendants' contention that some tiny fraction of class members' homes
 22 may contain Zonolite Attic Insulation not produced from Libby vermiculite is irrelevant to class
 23 certification and does not render the class definition overly broad. Libby is responsible for the lion's
 24 share of the world's vermiculite production, Grace has never demonstrated the use of material
 25 amounts of asbestos-free vermiculite in its Zonolite insulation, and plaintiffs need not prove that
 26
 27
 28

every single class member's Zonolite Attic Insulation came from Libby in order to have the class certified as proposed.^{2/}

Similarly, defendants' assertion that the use of the word "occupiers" renders the class definition overbroad or vague is incorrect. The use of this word serves an important purpose since all persons occupying homes with Zonolite Attic Insulation, whether the own lease, rent or merely reside them, are yet at risk, and need and deserve to be warned of the potential hazards in order to take steps to protect themselves by avoiding needless exposures to the hazard.

The proposed class is appropriate for certification as defined.

E. The Named Plaintiffs Are Adequate Representatives of the Class.

The purpose of the adequacy of the representation requirement is to ensure that the class representative and his counsel will be diligent and capable in protecting the interest of class members. *General Tel. Co. v. Falcon*, 457 U.S. 147, 157, 102 S. Ct. 2364, 2370-71, 72 L. Ed. 2d 740 (1982); *see also Hill v. Western Electric Co., Inc.*, 672 F.2d 381, 389, n.3 (4th Cir. 1982). Class Representatives Paul Price, John Prebil, and Margery Prebil, have already demonstrated their diligence in representing the class by bringing the present action, promptly seeking preliminary injunctive relief that runs to the benefit of class members, subjecting themselves to lengthy depositions, answering numerous interrogatories and requests for production, and subjecting their homes to days of testing by teams of defendants' experts. Nonetheless, defendants question the adequacy of class representation.

1. Plaintiffs Are Appropriately Involved in the Proceedings.

Defendants' attack upon the adequacy of the representative plaintiffs should be viewed skeptically, since Grace can be expected to always manufacture reasons to find any proposed representative plaintiff inadequate to pursue class claims against it:

The burden of establishing class requirements rests on plaintiff, but it is often the defendant, preferring not to be successfully sued by anyone, who supposedly undertakes to assist the court in determining

^{2/}Additionally, Plaintiffs are in possession of evidence showing that the Zonolite Attic Insulation on Mr. Lindholm's property does contain asbestos fibers and defendants' conclusory statements that Mr. Lindholm's property does not contain asbestos and contains non-Libby vermiculite should not be given any weight by this Court on the pending Motion for Class Certification.

whether a putative class should be certified. When it comes, for instance, to determining whether 'the representative parties will fairly and adequately protect the interest of the class,' or the plaintiffs' ability to finance the litigation, it is a bit like permitting a fox, although with a pious countenance, to take charge of the chicken house.

Eggleston v. Chicago Journeyman, 657 F.2d 890, 896 (7th Cir. 1981) (emphasis added; citation omitted). Grace's attacks also fail on the merits. Each of the proposed representative Plaintiffs has evinced steadfast resolve in enduring lengthy depositions and has articulated an unwavering commitment to obtaining class wide relief:

I strongly support class certification in a form that will enable the Court to implement the appropriate kinds of relief fulfilling the goals I described in my deposition, including notification, warning and education for homeowners, a program for safe removal or containment of the contaminated insulation, and creation of a fund to defray the costs thereof.

I am familiar with the latest screening results from Libby published by the ATSDR. These indicate to me the need for accelerated adjudication, and achievement of a resolution which will preserve the health of and prevent further injury to and/or death of members of the class. Everyone in the class needs and deserves knowledge of the asbestos hazard presented by attic insulation so that class members do not allow their children to play in zonolite insulated attics, and do not engage in remodeling, rewiring or other activities with would disturb the insulation and expose people to dangerous asbestos dust.

Affidavit of John Prebil, 3/21/01, at 2.

I strongly support class certification of the equitable claims as the best way of achieving the equitable asbestos notification, education and remediation program we are seeking.

I am especially concerned that all members of the class receive warnings and education which will prevent further exposures to homeowners and their children. Without sufficient warning and education, people have no reason to avoid disturbing the insulation and thereby cause dangerous exposures to asbestos dust. As recently as a few months ago I spoke with a man who was hauling vermiculite out of his attic with five gallon buckets who was unaware of the hazards of that activity.

Affidavit of Paul Price, 3/22/01, at p.2. See also deposition excerpts cited in Plaintiffs' opening memorandum.

Grace's assertion of a statute of limitation defense to Paul Price's claims is particularly implausible since Grace is contradictorily asserting, on the one hand, that Zonolite Attic Insulation is safe and class members need take no action of any kind to protect themselves from it

1 and, while on the other hand, suggesting that Paul Price should have sued Grace over the product
 2 many years ago. A California federal district court called such a contradictory situation a "Catch 22"
 3 for plaintiffs. *Barth v. Firestone Tire & Rubber Co.*, 673 F. Supp. 1466, 1476 (N.D. Cal. 1987).
 4 The plaintiff in *Barth* sought equitable medical monitoring to combat "an irreparable threat to his
 5 health that can be mitigated only by the creation of a medical monitoring fund." 673 F. Supp. at
 6 1476. The court agreed that the combination of a long latency period following toxic exposure and
 7 the class members' lack of knowledge of exposure "effectively deprived them of any remedy under
 8 the workers' compensation system," and, consequently, the court found it "disingenuous for the
 9 defendant to argue that [the representative plaintiff's] knowledge should preclude him from bringing
 10 this action." *Id.* at 1477. The court stated further:

11 the Court cannot preclude the putative class from seeking the relief it
 12 desires on the ground that the named plaintiff already possesses the
 13 knowledge that underlies the class remedy. . . . [t]he interests of the
 14 class can only be protected by someone who possesses knowledge of
 15 the alleged exposure. For the defendant to argue that as soon as one
 receives that knowledge money damages become sufficient places the
 plaintiff and the class in an untenable 'Catch 22' situation - - only a
 person with knowledge can bring suit and only someone without
 knowledge will have the necessary standing.

16 Id.

17 Class certification determinations are based solely on the allegations as set forth in the
 18 complaint, which are accepted as true, and do not involve an inquiry into the merits of the plaintiffs'
 19 claims. *Eisen v. Carlisle & Jacquelin*, 417 U.S. 156, 177-78, 94 S. Ct. 2140, 2153, 40 L. Ed. 2d 732
 20 (1974). "Plaintiffs need not even establish the existence of a cause of action in order to have a class
 21 certified" *Rodriguez v. Carlson*, 166 F.R.D. 465, 474 (E.D. Wash. 1996). The considerable
 22 merit of Plaintiffs' request for relief and the factual basis warranting that relief, therefore, may be
 23 appropriately considered following a determination that those claims may be adjudicated on a
 24 class-wide basis.

1 **F. Additional Arguments Advanced by Defendants Are Both Immaterial to Class**
 2 **Certification and Lack Merit.**

3 In opposing class certification, defendants feign concern for the class^{3/} and advance
 4 various positions going to the merits of the relief requested by Plaintiffs or the legal viability of those
 5 claims. Such attacks are not germane to the issue of class certification.

6 Shedding crocodile tears for the class members, Grace claims that plaintiff's reliance
 7 upon three simple theories of recovery; negligence, strict liability and fraud, impermissibly divests
 8 class members of the benefit of other potential theories of recovery. Grace Brief at 44-45. Grace
 9 thus argues both that Plaintiffs are too late to assert any claims at that they have asserted too few. To
 10 the contrary, the judicial goals of avoiding multiplicity of suits and litigation costs and expenses
 11 incident to such suits, are appropriately advanced by enabling narrowly tailored claims to proceed on
 12 a class basis, regardless of other potential claims. This viewpoint is in harmony with current class
 13 action jurisprudence.

14 A class representative need not assert every conceivable claim in order to be an
 15 adequate representative. A plaintiff pursuing a class action may, instead assert the class's most
 16 meritorious claims and need not assert all possible claims. In particular, claims which are not suited
 17 to class treatment, are appropriately excluded from a class complaint:

18 The fact that counsel has not tried to press claims against [defendant]
 19 which they believe (and justifiably so) are unsuitable for class
 20 treatment does not make them inadequate. To the contrary, that is the
 21 proper course for them to take.

22 *Sullivan v. Chase Inv. Serv.*, 79 F.R.D. 246, 258 (N.D. Cal. 1978); *see also Microsoft Corp v.*
 23 *Manning*, 914 S.W.2d 602, 610 (Tex. App. Texarkana 1995) (approving class counsel's decision to

24 ^{3/}Judge Molloy's recent order granting the EPA access to the Libby mine chides Grace for
 25 feigning concern for school kids to justify opposition to EPA remediation of commercial sites:

26 Defendants foresee dire consequences for the playgrounds of tender
 27 young school children, defenseless against the vicissitudes of EPA
 28 discretion. Grace should have acknowledged this concern for the
 public long ago in the sordid history of asbestos and its harmful
 effects.

Exh. 4, 3/9/01 Order at 15 (citation omitted).

1 pursue “only certain fraud claims, while omitting other claims that could have been asserted by other
2 plaintiffs”).

3 The relief Plaintiffs seek is a natural reflection of the predicament in which
4 Defendants have placed class members. Class-wide equitable relief to forestall future injury differs
5 radically from an individual personal injury claim for compensatory damages based on an existing
6 physical injury caused by exposure. In seeking to achieve equitable relief for the class and thereby
7 avert physical injury, while preserving class members’ rights to pursue personal injury claims in the
8 future should they have the misfortune of contracting a disease, Plaintiffs serve the class members’
9 interests and thereby demonstrate the adequacy of their representation.

10 Exclusion of even existing claims from the class complaint that may be brought by an
11 individual class member is appropriate. After all, the omission of individual claims from a class
12 complaint does not constitute a dismissal, nor does it bar the individuals from asserting themselves.
13 As the court remarked in *Sullivan*:

14 What defendants have characterized as “splitting” causes of action is
15 perfectly appropriate under Rule 23. It is not uncommon for
16 defendants to engage in a course of conduct which gives rise to a
17 variety of claims, some amenable to class treatment, others not. Those
18 claims that are amenable should be prosecuted as class actions in order
19 to realize the savings of resources of courts and parties that Rule 23 is
20 designed to facilitate.

21 *Sullivan*, 79 F.R.D. at 265.

22 It is well established that asserting certain claims on behalf of the class as a whole,
23 while reserving other claims for simultaneous or subsequent individual litigation, is proper and does
24 not estop litigation of other claims. *Microsoft Corp.*, 914 S.W.2d at 610. Indeed, Rule 23 itself
25 provides that “an action may be brought or maintained as a class action with respect to particular
26 issues.” Fed. R. Civ. P. 23(c)(4)(A). The Complaint in this action properly centers on three simple
27 theories of recovery and equitable remedies which seek to avoid contamination, serious injury and
28 death. Of course, this action does not include claims for personal injury, and Grace’s contention that
the Supreme Court’s decision in *Amchem* somehow forestalls certification of the narrow equitable
class proposed there is absurd. *Amchem Prods. v. Windsor*, 521 U.S. 591 (1997). To the contrary,
Amchem endorses class certification of claims, like those in this action, meriting judicial attention

1 but which cannot be economically litigated on an individual basis. *Id.* at 617 (citing *Mace v. Van Ru*
2 *Credit Corp.*, 109 F.3d 338, 344 (7th Cir. 1997)).

3 Finally, Defendants' attack upon purported differences among the states' laws of
4 negligence, strict liability and fraud blindly disregards compelling similarities of law in the failure to
5 warn context, similarities which are appropriately and fairly applied to this action where compelling
6 evidence of Grace's nondisclosure of extraordinary asbestos hazards suffices to fairly adjudicate its
7 potential liability in a single forum, under the laws of each and all of the states. The knowing
8 suppression or concealment of a material fact by one with a duty to disclose is universally actionable;
9 no state law condones such conduct. Plaintiffs will supply the Court with a specific trial plan once
10 the Court indicates how it wishes to address class certification.

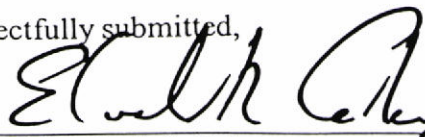

11 **II. CONCLUSION**

12 This is an ideal case for class treatment, which is indispensable to fairly and
13 efficiently resolve the central issues common to all claims, whether asbestos-contaminated Zonolite
14 Attic Insulation poses a contamination and exposure hazard when disturbed, whether Grace is liable
15 for failing to warn of the hazards and whether Plaintiffs are entitled to the asbestos notification,
16 education and remediation program they contend to be necessary to preserve health and avoid
17 needless contamination, injury and death.

1 DATED: March 23, 2001

Respectfully submitted,

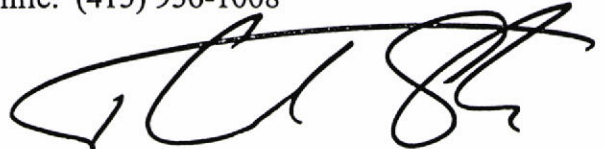
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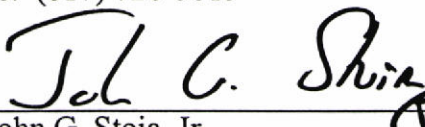

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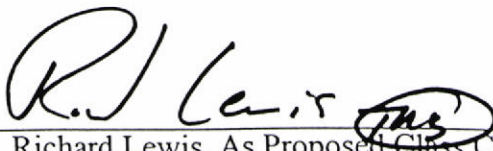
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Attorneys for Jan Hunter

UNITED STATES DISTRICT COURT
DISTRICT OF MASSACHUSETTS

In re:)	MDL Docket No. 1376
)	
ZONOLITE ATTIC INSULATION)	The Honorable Patti B. Saris, Presiding
PRODUCTS LIABILITY LITIGATION)	
)	

THIS DOCUMENT RELATES TO: ALL)	
ACTIONS)	

RULE 26 INITIAL DISCLOSURE STATEMENT
OF DEFENDANTS W. R. GRACE & CO.-CONN. AND W. R. GRACE & CO.

Defendants W. R. Grace & Co.-Conn. (hereinafter "Grace") and W. R. Grace & Co., a Delaware corporation (hereinafter "Grace Delaware"), hereby disclose the following pursuant to Local Rules 26.1(B) and 26.2(A) of the United States District Court for the District of Massachusetts.

1. The following individuals are persons who are believed to have witnessed or participated in the transactions or occurrences giving rise to the claims and defenses or are otherwise known or believed to have substantial discoverable information about the claims or defenses in this action. Grace and Grace Delaware reserve the right to amend this list as additional information becomes available.

1. Mr. Wilfred G. Archambo
26 Kittrell Street
Springfield, MA 01101
(413) 782-4210

Mr. Archambo, a former Grace sales representative, may testify about the selling, marketing and distribution, as well as the composition and performance, of attic insulation.

2. Bruce A. Blessington
Bionostics Inc.
2 Craig Road
Acton, MA 01720
(978) 263-3856

Mr. Blessington, a former Grace employee, was at various times the Marketing Manager and the Manager for Zonolite Insulation Products.

3. James Cintani
35 Highland Drive
Yardley, PA 19067
(215) 493-4786

Mr. Cintani, a former Grace employee, was a sales representative and Regional Manager. He may testify about the selling, marketing and distribution, as well as the composition and performance, of attic insulation.

4. William Culver
1300 W. Boston St., #41
Seattle, WA 98119
(206) 284-3106

Mr. Culver, a former Grace employee, was a Regional Manager. He may testify about the selling, marketing and distribution, as well as composition and performance, of attic insulation.

5. Heyman C. Duecker
35 Robin Hill Road
Chelmsford, MA 01824-3808
(978) 256-5722

Mr. Duecker, a former Grace employee, was at one time Vice President for Research at the Construction Products Division. In that role, he supervised various research projects involving attic insulation.

6. Frederick W. Eaton
127 Authors Road
Concord, MA 01742
(978) 369-5676

Mr. Eaton, a former Grace employee, was an engineer for the Construction Products Division. He became the environmental coordinator for CPD. He conducted many tests during the application and installation of attic insulation.

7. Thomas Egan
Floors & Fireproofing, Inc.
114 E. Baltimore Ave., Suite 3
Lansdowne, PA 19050
(610) 284-4940

Mr. Egan, a former Grace employee, was a Regional Manager. He may testify about the selling, marketing and distribution, as well as composition and performance, of attic insulation.

8. James Stanford Titus
5 Knoll Drive
Yardley, PA 19067

Mr. Titus, a former Grace employee, was a sales representative and Regional Manager. He may testify about the selling, marketing and distribution, as well as the composition and performance, of attic insulation.

9. Harry Eschenbach
12 Cougar Run
Hilton Head, SC 29926-1952
(843) 689-5509

Mr. Eschenbach is a former director of Health, Safety and Toxicology for Grace. He may testify about health, safety and toxicological issues as well as about the vermiculite mining and milling operations of the Zonolite Company and W.R. Grace at Libby, Montana and Enoree, South Carolina, and about the exfoliation process at Zonolite and Grace expanding plants.

10. O. Mario Favorito
W. R. Grace & Co.
62 Whittemore Avenue
Cambridge, MA 02140
(617) 876-1400

Mr. Favorito was legal counsel to the Construction Products Division.

11. Robert Frohlich
552 Springs Road
Bedford, MA 01730
(781) 275-2362

Mr. Frohlich, a former Grace employee, held various positions. He was a sales representative and a district sales manager for a licensee of Grace. He joined the Construction Products Division in the early 1970's as a product manager.

12. Paul Keefe
W. R. Grace & Co.
62 Whittemore Avenue
Cambridge, MA 02140
(617) 876-1400

Mr. Keefe was the Product Manager when Grace stopped manufacturing attic insulation.

13. Robert H. Locke
95 Spring Road
Concord, MA 01742
(978) 369-8549

Mr. Locke, a former Grace employee, worked on issues involving tremolite.

14. Allen Stringer
W.R. Grace & Co.
P.O. Box 695
Libby, MT 59923
(406) 293-3964

Mr. Stringer, a Grace employee, may testify generally regarding the mining and milling process used in Libby and the history of the Libby vermiculite mine.

15. Robert Upchurch
23191 Farmington Road
Farmington, MI 48336

Mr. Upchurch, a former Grace employee, was a District Manager. He may testify about the selling, marketing and distribution, as well as composition and performance, of attic insulation.

16. Rodney Vining
6360 Pelican Bay Blvd., Apt. 201-C
Naples, FL 34108
(941) 566-8752

Mr. Vining, a former Grace employee, may testify generally about Grace products and corporate history. He was President of the Construction Products Division.

17. Robert Walsh
P.O. Box 459
Quechee, VT 05059
(802) 295-1987

Mr. Walsh, a former Grace employee, was at different times Executive Vice President and President of the Construction Products Division. He made the decision to stop selling attic insulation.

18. Bruce R. Williams
27 Nickerson Road
Lexington, MA 02173
(781) 862-4769

Mr. Williams, a former Grace employee, became the Vice President of Building Products in the Construction Products Division.

19. W. Reed Wright
304 North Channel Drive
Wrightsville Beach, NC 28480
(910) 256-6223

Mr. Wright, a former Grace employee, was Manager of Manufacturing. He had responsibility for the manufacturing of products of the Construction Products Division, including Zonolite Attic Insulation.

documents regarding the operation of the Libby, Montana mine and mill. By order of a Montana state court judge, 81 boxes of records have been returned to Libby, Montana for review by McGarvey, Heberling, Sullivan & McGarvey, one of the plaintiffs' attorneys in these cases. Copies of the contents of all but 12 of those 81 boxes are also available at the Winthrop Square repository.

II. Headquarters of Grace's Construction Products Division,
Cambridge, Massachusetts

Approximately 950 boxes of original documents relating to the manufacture and sale of vermiculite products, including but not limited to Attic Insulation.

III. Documents Maintained by Holme, Roberts & Owen, LLP in Denver
and/or Boulder, Colorado

Approximately 950 boxes of original documents regarding the operations of Grace's former mine and mill in Libby, Montana, including sales records for Libby vermiculite and other Zonolite products. Approximately 365 of these 950 boxes contain ledgers reflecting sales of Zonolite products and the balance relate to the Libby mine and mill.

IV. Additional Documents

In addition to the documents described above, there may be potentially relevant documents which have not yet been reviewed by counsel for Grace and Grace Delaware. The majority of such documents would have been created after Grace's comprehensive review for asbestos-related documents in the mid 1980's. The most likely location for such documents is the headquarters of Grace's Construction Products Division in Cambridge, Massachusetts. Grace and Grace Delaware estimate that between 2 and 3 million pages of potentially responsive documents may be in Cambridge.

3. Grace and Grace Delaware have not obtained any statement from the plaintiffs regarding the subject matter of the claims. Of course, some plaintiffs have been deposed in these cases.

4. Federal agencies, including the Environmental Protection Agency, the United States Consumer Products Safety Commission, the Federal Trade Commission and others corresponded with Grace-Conn. concerning vermiculite in the 1970's and 1980's. More recently, the U.S. Environmental Protection Agency has been conducting an investigation regarding vermiculite operations at Libby, Montana, formerly owned and operated by Grace-Conn.

5. The following is excerpted from Grace's most recent annual report.

Grace previously purchased insurance policies with respect to its asbestos-related lawsuits and claims.

...

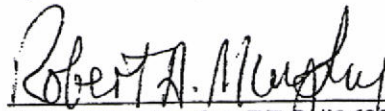
Grace has settled with and been paid by its primary insurance carriers with respect to both property damage and bodily injury cases and claims. Grace has also settled with its excess insurance carriers that wrote policies available for property damage cases; those settlements involve amounts paid and to be paid to Grace. In addition, Grace has settled with many excess insurance carriers that wrote policies available for bodily injury claims. Grace is currently in litigation with certain remaining excess insurance carriers whose policies general represent layers of coverage Grace has not yet reached. Such policies are believed by Grace to be available for asbestos-related bodily injury lawsuits. Insurance coverage for asbestos-related liabilities has not been commercially available since 1985.

...

In Grace's opinion, it is probable that recoveries from its insurance carriers . . . , along with other funds, will be available to satisfy the property damage and bodily injury cases and claims pending at December 31, 1999, as well as bodily injury claims expected to be filed in the future.

Dated: February 15, 2001

Respectfully submitted,
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By their attorneys,



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CERTIFICATE OF SERVICE

I, Robert A. Murphy, hereby certify that on February 15, 2001, I caused to be served copies of the following documents:

1. Rule 26 Initial Disclosure Statement of Defendants W. R. Grace & Co.-Conn. and W. R. Grace & Co.;
2. Certificate of Service; and
3. Courtesy Letter to Judge Saris

upon the following counsel by fax:

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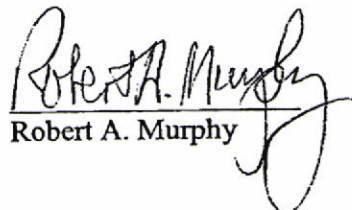
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